Clow Water Systems Company, Division of McWane, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 8–CA–24749

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPEHENS AND TRUESDALE

On May 16, 1994, Administrative Law Judge Richard A. Scully issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief, and counsel for the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue in this case is whether a union's electronic facsimile transmission (fax) to the Respondent of the economic strikers' unconditional offer to return to work constituted effective notification for the purpose of establishing the strikers' right to reinstatement as of the time the fax was received at the Respondent's facility. The judge found that in the circumstances presented here it was not and that effective notification did not occur until the person to whom the fax was addressed received actual notice of the fax and its contents. Because the latter event occurred after the date on which the Respondent hired 27 permanent strike replacements, the judge dismissed the complaint, which alleged that the Respondent had violated Section 8(a)(3) and (1) of the Act by failing to reinstate returning strikers to those 27 positions. For the following reasons, we disagree with the judge's finding concerning the effective date of the strikers' unconditional offer to return; and we reverse and find that the Respondent violated the Act as alleged.

A. *Essential Factual Findings*

The credited and essentially undisputed evidence reveals that the Union has been the certified bargaining representative of the Respondent's production and maintenance employees since 1966. The most recent contract between the parties was set to expire on February 23, 1991, but was extended by agreement during continuing bargaining by the Respondent, represented by Vice President and General Manager Stephen Smith, and the Union, represented by Staff Representative Robert Andrews.[1] The contract extension lapsed, however, when the employees engaged in an economic strike commencing June 21, 1991.

The Respondent continued to operate during the strike at about 25 percent capacity by using salaried personnel, but made no efforts to hire replacements. Then, in early January 1992,[2] the Respondent sent letters to the Union and the striking employees, in which it invited the strikers to return to work, and announced an intention to begin hiring striker replacements. This prompted Andrews to make an offer to return to work on behalf of the strikers. The offer was transmitted to Smith by a letter that Andrews both hand-delivered and sent by certified mail, and it was also transmitted by a telephone call that Andrews made to Smith at his home sometime after midnight on Friday, January 17.[3] In his call to Smith, Andrews stated that the members had voted to reject the Respondent's contract offer but had also voted to return to work, and that he was also sending Smith a letter containing the offer to return to work. The strikers returned to work in January but resumed their strike on February 11, pursuant to a vote of the local membership. After resumption of the strike, the Respondent decided to return to full production by hiring permanent replacements, and began doing so on February 15 and 18. Andrews, upon learning that the Respondent was hiring replacements, began talking with other union officials about ending the strike.

On February 21, Smith and his secretary spent the entire day away from their offices, performing production work out in the plant. On that day, Andrews placed a number of calls to Smith in an effort to ascertain whether the new hires were permanent replacements for strikers. He first called at about 11:40 a.m., and was told that Smith was not in his office. Andrews left a message for Smith to return the call as soon as possible. Andrews placed a second call at 12:30 p.m. and was told that Smith was out in the plant and had been given his message. Andrews then spoke to Personnel Manager Frank Eschleman and explained that he was trying to find out from Smith if the replacements were permanent hires. (Andrews' testimony that he also told Eschleman that the Union was considering returning to work was discredited.) Eschleman said that he understood they were permanent. Andrews responded that he still had to hear it from Smith, and Eschleman assured Andrews that he would get the message to Smith. At 3:30, Andrews, after calling the

[1] Smith and Andrews made no agreement for any specific method of communication during their contract negotiations; however, they did agree to deal only with each other. In addition to face-to-face meetings, they communicated by telephone and letter; and both also used fax transmittals for some contract proposals.

[2] Unless otherwise indicated, all dates are in 1992.

[3] Smith had previously furnished his unlisted telephone number to Andrews.

local union office at about 3:24 p.m. to inform the officers of the International's decision that the strikers return to work, again attempted to telephone Smith but succeeded only in speaking to Eschleman, who advised Andrews that he had relayed the previous message to Smith.

Smith testified that he had been informed by Eschleman during the early afternoon on February 21 of Andrew's telephone calls, but that he assumed that Andrews' questioning about the status of the replacements was in preparation for a scheduled negotiation meeting the following Monday, February 24. He further assumed that there was no urgency to respond before then. Later that afternoon, Andrews prepared a letter to Smith containing an unconditional offer to return to work, which he faxed to the Company's premises. The fax machine's ''send report'' revealed that a successful transmission was made at 4:34 p.m.

Smith finished working at about 3:30 p.m., took a shower and checked his mail[4] before leaving the plant at 4:30 to escort his daughter to a social function. Smith testified that when he left the plant, the strikers were picketing as usual. The following day, the Respondent interviewed applicants at a local hotel, and hired 27 permanent replacements, who were instructed to report for work on Monday, February 24.[5] On Sunday, the local membership met to discuss returning to work, and on Monday, February 24, they appeared in force at the gate, but were not allowed to enter.

On Monday, Andrews contacted Smith and asked why the strikers were not being returned to work, referring to the offer to return that he had faxed to Smith on Friday. Smith expressed surprise that there had been an offer to return. Smith inquired of Eschleman who stated that he also was unaware of any fax transmission. Smith then asked Ruby Hall, the switchboard operator, to check Smith's mailbox, and she did so and found none. Hall then contacted someone in the sales department who found the fax still on the fax machine.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate 27 economic strikers who offered unconditionally to return to work prior to their having been replaced. The judge found that the General Counsel had failed to establish that the Respondent knew of the fax transmission, and that its mere arrival, unannounced and unseen in the sales department after Smith, the addressee, had left for the day on Friday, did not constitute effective notification to the Respondent until Monday, when Smith next returned to the plant and received actual notice of the offer to return. The judge therefore dismissed the complaint allegations and concluded that the Respondent's hire of 27 replacement employees on Saturday, February 22, did not violate Section 8(a)(3) and (1) of the Act. We reverse.

B. *Analysis*

It is undisputed that the fax communication was received at the Respondent's facility during business hours prior to the hire of replacements. During the negotiations between the Respondent and the Union, the Respondent had accepted as an appropriate means of communication the use of its fax machine. The Respondent therefore bears the responsibility for maintaining adequate office procedures concerning fax transmissions, and knowledge of the receipt of the Union's fax communications during regular office hours may reasonably be imputed to it.[6] Proof of actual knowledge, as the judge appears to require, would render transmission by fax virtually useless by placing an unsustainable burden on the sender to insure that the fax has been seen by the person to whom it is addressed. The judge's reliance on his observation that mail service, unlike fax transmissions, involves regular daily deliveries which may be anticipated, overlooks the fact that some mail services and private courier services do not operate on established, routine schedules. Furthermore, requiring a showing of actual knowledge, at best, places the burden of a recipient's negligent failure to monitor its machine on the sender and, at worst, invites mischief by enabling a party to escape the consequences of notification by design.[7]

Here, although the dissent relies on the fact that the Union communicated its previous offer to return by means other than a fax, we find it more significant that the parties had previously used various means of com-

[4] The record shows that Smith's office is located on the first floor, the showers and mailroom are located on the second floor, and the only fax machine is located on the second floor in the sales department that adjoins the mailroom.

[5] The Respondent also hired five other employees on February 22 to fill nonstrike positions.

[6] Contrary to our dissenting colleague's contention, the requirement that an employer maintain adequate procedures to monitor the receipt of fax transmissions does not exceed the standard that the Board applies to itself, where a fax is deemed received for notice purposes when it is received at a Board fax station. In any event, we are reluctant to compare procedures concerning communications made during the regular course of business between a union and an employer to the Board's rules regarding parties' filing of formal papers or otherwise transmitting relevant information.

[7] We also disagree with the dissent's prediction that the rule that we have applied in this case concerning the receipt of fax tranmissions would create an incentive for an employer to keep secret its plans to hire strike replacements, presumably in order to prevent the union from submitting an offer to return to work and claiming that the employer evaded notice of the offer. Rather we find it more likely that, in the strike context, an employer would make information about potential replacement workers known to the union in order to strengthen its own bargaining power and thereby increase the likelihood of a favorable end to the strike. By the same token, a union has a strong interest in asssuring that its offer to return is effectively communicated to an employer to ensure the strike's prompt resolution. We note that the record does not support the dissent's characterization of the Union's transmittal of its offer to return by fax as an attempt to provide constructive but not actual notice.

munication during the regular course of business, including fax, and did not have one agreed-on or preferred method which would render the use of other methods ineffective. In addition, Andrews tried several times to contact Smith by phone, left messages for Smith to return his call, and discussed the status of the replacement workers with the Respondent's personnel manager, Eschleman. In view of these efforts, and because the parties *had* agreed that Smith and Andrews would communicate only with each other, we disagree with our dissenting colleage's reliance on Andrews' failure to inform Eschelman that the Union had prepared an offer to return. We similarly disagree with the dissent's suggestion that Andrews' limited communications with Eschleman when Smith was not available violated the parties' ground rule that all essential communications would be between Andrews and Smith.

We therefore find that the fax transmission was an effective communication of the offer to return to work, that this occurred before the hiring of the 27 replacements at issue, and that the Respondent's refusal to reinstate the affected 27 strikers violated Section 8(a)(3) and (1).

REMEDY

We have found that the Respondent unlawfully refused to reinstate economic strikers immediately following the Union's February 21, 1992 unconditional offer on their behalf to return to work. Therefore, we shall order the Respondent to cease and desist from its unlawful activity and to offer those affected employees immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. In order to make room for them, the Respondent shall dismiss, if necessary, any persons hired in their place after the strike terminated. We shall further order the Respondent to make whole those employees for any loss of earnings and other benefits they may have incurred by reason of the Respondent's discrimination against them, including backpay from the time of their application to return to work. Backpay, with interest, shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Clow Water Systems Company, Division of McWane, Inc., Coshocton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate economic strikers who unconditionally offer to return to work before permanent replacements are hired and/or at a time when vacancies are available.

(b) Continuing to hire replacement employees after strikers have made an unconditional offer to return to work, thereby discriminating against such strikers.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole employees who unconditionally offered to return to work before permanent replacements had been hired and at a time when vacancies were available, as well as those employees who were discriminated against by Respondent's continuing to hire replacement employees after the strikers' unconditional offer to return to work, for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying a sum of money equal to the amount they normally would have earned from the date of the discrimination to the date when they were in fact reinstated by Respondent, in the manner described in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Coshocton, Ohio facility copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 8 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER STEPHENS, dissenting.

For the reasons stated by the judge, I would affirm his finding that the Union did not, until Monday, February 24, provide the Respondent effective notice, on behalf of the striking employees, that they were offering to return to work. I therefore also agree with him that the complaint should be dismissed, since the hir-

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

ing of the 27 striker replacements on the prior Saturday was lawful and relieved the Respondent of any obligation to reinstate strikers to those positions when they appeared at the plant gate on Monday.

Like the judge, I do not rely on the notion that the recipient of a fax transmission must in all cases have actually seen the document in order to be deemed on notice of its contents.[1] Rather, I think the governing consideration is whether the sender of the fax has transmitted it in a way that is reasonably calculated to give notice under the circumstances. The following circumstances of this case are particularly notable: (1) the fact that Union Negotiator Andrews had used other means of transmission a month earlier to convey an offer to return to work during the first phase of the strike (a letter sent by mail and by hand delivery and a telephone call to Smith's home after business hours); (2) Andrews' failure, in repeated conversations with Personnel Manager Eschleman on Friday, February 21, to mention that an offer to return to work was possibly in the offing; and (3) Andrews' admission that in most previous instances when he had used a facsimile machine to transmit bargaining proposals, he had also contacted Smith to advise him that a fax was being sent—something he did not do in the case of the February 21 unconditional offer to return.[2]

The Union's selective utilization of communications with Eschleman further supports the conclusion that its efforts at notification of the offer to return were inadequate. Notwithstanding Andrews' claim that he and Smith had agreed on a ground rule of dealing only with one another, Andrews, in effect, acknowledges having disregarded that rule. Andrews testified that when he was unable to speak with Smith earlier on Friday, he questioned Eschleman about whether the replacements would be permanent.[3] Indeed, it was Eschleman's retelling of this conversation to Smith that caused Smith to view Andrews' efforts to talk with him as noncritical and that resulted in Smith's not returning Andrews' call that afternoon. Nevertheless, Andrews reasserts this ground rule with Smith as his reason for not thereafter informing Eschleman, in their telephone conversation at 3:30 p.m., about any impending offer to return. The next communication by Andrews to the Respondent was the fax addressed to Smith, which was transmitted at 4:34 p.m. In my view, Andrews' earlier unsuccessful attempts to contact Smith by phone before the Union decided to return the employees to work, and his last conversation with Eschleman, without leaving a message for Smith about the offer to return, is insufficient to show that the sole use of the fax transmission was a reasonable effort to give notice to Smith of the offer to return. At the very least, it seems reasonable that the Union should have again sought to use Eschleman, who it knew had successfully conveyed information to Smith that afternoon, for the purpose of communicating the employees' offer to return.

In sum, Union Negotiator Andrews—although on notice of the Respondent's announced plans to hire replacements, and although having numerous means of assuring notification of an offer to return—chose to use an unannounced facsimile transmission, which the record does not establish was a usual mode of communication between the parties even for less urgent messages. Under all the circumstances, the Union may properly be held accountable for the undisputed fact that none of the Respondent's agents learned of the Union's offer until the morning of February 24. Accordingly, I agree with the judge's recommended dismissal of the complaint in this proceeding.

The only advantage of the the majority's straightforward rule is its apparent ease of application—at a minimum, the sender need only confirm (by an electronically generated receipt) the successful transmission of the fax during normal business hours to impute that the employer had notice of the strikers' offer to return to work. The majority suggests that the employer may easily accommodate this rule merely by maintaining ''adequate'' office procedures for monitoring and handling fax transmissions. Perhaps the day will come when all businesses—large and small —will be able to abide by this standard. But, to my knowledge, we Board Members do not impose such a norm on our own operations at headquarters. Faxes addressed to us may arrive in the mailroom near the end of a business day that are not actually delivered to our offices until the next business day.[4] Imposing a rule

[1] Appropos is an observation of the court of appeals that was cited in a Board case where there was credited evidence that the employer had attempted to evade a union's efforts to tender a return to work offer: ''Under a statute requiring cooperative attitudes to achieve industrial peace, common sense dictates that artificial devices created by [an employer] to avoid knowledge of [a] demand cannot succeed.'' *NLRB v. Regal Aluminum*, 436 F.2d 525, 527 (8th Cir. 1971), cited in *Barnsider, Inc.*, 195 NLRB 754, 764 (1972). In my view, artificial rules for imputing knowledge to a recipient can be equally troublesome. As the Board's decision in *Barnsider*, supra, shows, a more common sense approach still enables the Board to address the majority's concern over an employer's efforts to evade notice. Here there is no evidence that the Respondent's agents engaged in any such evasive conduct.

[2] There is no basis for finding that Andrews reasonably believed Smith was seeking to avoid such a call; the judge discredited Andrews' testimony concerning unanswered telephone calls between 3:45 and 4:30 p.m.

[3] On the strength of Eschleman's affirmative response to this question, Andrews and International Union officials decided by telephone on Friday afternoon to end the strike, and Andrews subsequently directed the local president to call a ''Special Meeting'' for Sunday.

[4] If a sender wants to assure that we receive the fax promptly, he or she will typically alert us by telephoning our office directly, so that the fax can be immediately retrieved.

The majority's observation that the Board nevertheless imposes on itself a rule that notice by fax is deemed effective upon receipt at

Continued

that facsimile transmission constitutes constructive notification of an offer to return can produce opportunities for games-playing, as the circumstances present in this case seem to illustrate. Thus, the Union sought and received confirmation through Eschleman on Friday afternoon that the Respondent would be hiring permanent striker replacements on Saturday. Despite this forewarning of a critical turn of events, the Union was not then able to consult with employees prior to making a timely response, but planned to meet next with striking employees that Sunday.[5] Accordingly, the Union's selection of fax as the method for communicating its offer to return, and addressed only to Smith, even though it had reason to believe that Eschleman was still at work, could be viewed as a conscious attempt to provide constructive, but not actual, notice of an offer to return to work. Under this scenario, the Union had the best of both worlds: It could prevent the striking employees from being informed directly or through the Respondent that the Union had decided to end the strike, at least until the Union could convince the employees of this approach that Sunday, while at the same time preserving their reinstatement rights in the face of the actual hiring of striker replacements on Saturday.

For all of the foregoing reasons, I decline to infer timely notice from the fax communication in the circumstances of this case.

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the Board's fax station in no way supports its position in this case. On the contrary, it proves too much, in that even where such constructive notice is self-imposed, the Board's experience—not disputed by my colleagues—is that delays in notification may nevertheless result. In the absence of any showing that the Respondent even attempted to impose on itself a similar obligation to deem itself in immediate receipt of information received by fax transmissions, there is even less cause to impute to this Respondent constructive knowledge at the time of receipt of the Union's fax.

[5] In light of the fact that the local membership had earlier resumed the strike on February 11, after the Union had called it off on January 17, it is apparent that the membership was not always in agreement with the decisions made by the leadership. Accordingly, Andrews directed the local president to call a ''special'' meeting on Sunday either to persuade them to change their minds and agree to return to work, or to transmit an order from the International Union for them to do so.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to reinstate economic strikers who unconditionally offer to return to work before permanent replacements are hired and/or at a time when vacancies are available.

WE WILL NOT continue to hire replacement employees after strikers have made an unconditional offer to work, thereby discriminating against those strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL make whole the unreplaced strikers who were not reinstated on their unconditional offer to return to work, for any loss of earnings or other benefits they may have suffered by reason of our failure to reinstate them to the date they were reinstated, less net interim earnings, plus interest.

CLOW WATER SYSTEMS COMPANY

Richard F. Mack, Esq., for the General Counsel.
William F. Gardner and *William K. Thomas, Esqs.*, of Birmingham, Alabama, for the Respondent.
Robert Andrews, of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on July 17, 1992, by United Steelworkers of America, AFL–CIO–CLC (the Union), the Regional Director for Region 8 and the National Labor Relations Board (the Board) issued a complaint on August 31, 1992, alleging that Clow Water Systems Company (the Respondent) committed violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violation of the Act.

A hearing was held in Coshocton, Ohio, on February 18, 1993. Because of the failure of the reporter to produce a record of the proceedings, a new hearing was held on August 11, 1993, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Upon the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with an office and plant in Coshocton, Ohio, engaged in the manufacture of pipe. Annually, in the course of its business operations, the Respondent sells and ships goods valued in excess of $50,000 directly to points located outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondent admits, and I find, that at all times material the Union and its Local 7014 were labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Since 1966, the Union has been the exclusive collective-bargaining representative of the Respondent's production and maintenance employees. A collective-bargaining agreement which was to expire on February 23, 1991, was extended by the parties until commencement of an economic strike by bargaining unit employees on June 21, 1991. The strike continued until the Union made an unconditional offer to return to work on behalf of the striking employees in January 1992.[1] After returning to work, the unit employees went out on strike again on February 11 and the Respondent began hiring permanent replacement workers. On Friday, February 21, the Union decided to end the strike[2] and, during the afternoon, it transmitted an unconditional offer to return to work to the Respondent by electronic fascimile communication (fax). The Respondent hired additional replacement workers on the next day, Saturday, and told them to report to work on the following Monday morning. When the strike ended, about 130 of the approximately 200 strikers were not promptly reinstated, although, subsequently, all eligible employees did return to work. The only issue is whether or not there was an effective unconditional offer to return to work before 27 permanent replacement workers were hired on Saturday, February 22.

During the contract negotiations, the chief spokesmen were Vice President and General Manager Stephen Smith for the Company and Staff Representative Robert Andrews for the Union. Andrews had been temporarily assigned to conduct the negotiations for the Union and the two men had no contact with one another prior to these negotiations. The parties had not agreed upon a specific method of communication during the negotiations or the strike, but according to Andrews, there was an understanding that all communications would be between Andrews and Smith. During the negotiations, Smith had given Andrews his unlisted home telephone number. When the Union made the first offer to return to work, Andrews had telephoned Smith at home in the early morning hours of Saturday, January 18, and told him of the offer to return to work. He also sent a letter containing the offer by certified mail addressed to Smith and hand-delivered a copy of the letter to the plant in the early morning hours of January 18.

No replacement workers were hired by the Respondent prior to February and salaried employees continued to operate the plant at about 25 percent of capacity. After resumption of the strike, the Respondent decided to attempt to return to full production by hiring permanent replacement workers and began doing so on February 15, when 31 were hired and February 18, when another 51 were hired.

Andrews testified that learning that the Respondent was hiring replacement workers and concern that they were permanent prompted him and other officials of the Union to consider ending the strike and that they were discussing doing so on February 21. On that date at about 11:40 a.m., he attempted to telephone Smith to find out the Company's position on whether the replacement workers were considered temporary or permanent. He was told that Smith was not in his office and he left a message asking Smith to call him as soon as possible. When Smith did not call back, he placed another call at about 12:30 p.m. and was told that Smith was out in the plant and had been given his message. He then asked to speak with Personnel Manager Frank Eschleman and explained that he was trying to reach Smith to ascertain the Company's position on the replacement workers. Eschleman told him that he understood they were permanent. Andrews said he still had to hear it from Smith and Eschleman assured him he would get the message to Smith. Andrews testified that during this conversation he told Eschleman that the Union was considering returning to work. He said that, thereafter, the decision to return to work was made and that he called the local in Coshocton at 3:24 p.m. to inform the officers of the decision. At 3:30 p.m., he called the plant and was unable to get Smith. He again spoke to Eschleman, who told him that Smith would call him before he left the plant for the day. He placed calls to the Company at about 3:45 and 4:30 p.m., which were not answered, leading him to believe that the Company was trying to avoid him by not answering its telephones. He then prepared a letter to Smith containing an unconditional offer to return to work which was faxed to the Company's premises at about 4:35 p.m. The fax machine's ''send report,'' in evidence, indicates a successful transmission was made at 4:34 p.m. Andrews testified that he met with the strikers on Sunday and told them to come to the plant the following morning. In the morning, he went to the plant gate and asked a guard to contact Smith and eventually got to speak to him by telephone. Andrews asked him to let the employees in to work and Smith said they had no notice of the Union's intent to return and could not let them in. When he told Smith he had sent the offer to return by fax on Friday, Smith said he had no knowledge of it.

Stephen Smith testified that although the Company had continued to operate during the strike without hiring replacement workers, in late December 1991, it made a decision to begin hiring replacements and so informed the Union and striking employees in letters dated January 2, 1992. These communications invited the strikers to return to work and stated that any replacement workers hired would be considered permanent. Andrews responded by asking Smith to hold off hiring the replacements which he agreed to do. On January 18, Andrews informed him that the union membership

[1] Hereinafter all dates are in 1992.

[2] Although the Union normally conducts a strike authorization vote among the members of the local involved, nothing in its constitution or bylaws requires such a vote to end a strike and the staff representative has the authority to do so.

had voted to reject the Company's latest contract offer but had agreed to return to work. After returning to work, the employees resumed striking and picketing on February 11. When the strike resumed Andrews informed him that ''it was going to be long and hard.'' He said that at that point he determined that it would be necessary to hire replacement workers in order to return to full production. He also said that after the strike resumed he had met with Andrews and the union committee and the possibility of a return to work was not mentioned. On February 21, he spent the entire day away from his office, working in the pipe shop operating a casting machine from 7:30 a.m. to 3:45 p.m. There was no telephone in the pipe shop. At about midday he learned that Andrews wanted to talk to him. He testified that Eschleman had told him that Andrews had questions about the replacements, that it was not the first time Andrews had asked about them, that he assumed that Andrews wanted the information in connection with a negotiating session scheduled for the following Monday evening, and that he was not aware of any urgency about answering the questions. Eschleman said nothing about Andrews mentioning that the Union was considering returning to work. After he finished work, he took a shower and went to the mailroom to pick up the mail in his box, which did not include a fax or any other communication from Andrews or the Union. He left the plant at 4:30 p.m. and went to attend a social function with his child. At the time he left the plant, he had no knowledge of any fax from Andrews. He returned to his home between 9 and 10 p.m. and did not subsequently receive any calls from Andrews. There were no messages on his answering machine when he returned that night. He testified that, on Saturday, he participated in the hiring session held by the Company for applicants for employment and that nothing was done to increase the number of applicants that were interviewed or hired. At no time on Saturday did he have any knowledge that the Union had sent an offer to return to work. He was informed on Saturday that the picket line was still up at the plant as it had been when he left on the previous evening. He received no calls or messages from the Union on Saturday or Sunday. At midafternoon on Sunday, he was told by Plant Manager Dick Stoker that there was a rumor that the strikers did not want to return to work but that the International Union was ordering them to do so and that there would be a gathering at the plant on Monday morning. On Monday morning at about 5 a.m., there were approximately 200 people gathered outside the gate. Shortly after his arrival at the plant, he spoke by telephone with Andrews who said that he had faxed an offer to return to work to Smith on Friday at 4:35 p.m.

Frank Eschleman testified that he spoke with Andrews on two occasions on Friday, February 21, and that Andrews did not say anything about ending the strike or returning to work or that the Union was considering doing so. He said he first spoke to Andrews at about 12:30 p.m. and that he said he wanted to speak to Smith, that he had been unable to reach him, and that he had some questions he needed answered. Andrews said he needed to know if the replacement workers were temporary or permanent, how many there were, and what procedure the Company was using for replacement. Andrews said that he needed this information because several strikers had asked if they were being permanently replaced and that he had to inform Union District Director Dan Martin what the situation was. After talking with Andrews, he went to the pipe shop and told Smith that Andrews wanted information and the three questions he had asked. He spoke with Andrews again that afternoon and told him that he had spoken to Smith about Andrews' previous call. Andrews said nothing during this call to indicate the Union was considering a return to work and he did not promise him that Smith would call him before he left the plant. Eschleman testified that he has responsibility for the Company's telephone system, that all incoming calls come into a switchboard attended by an operator during business hours and that at 5 p.m. incoming calls are switched over and answered by a guard at all times when the switchboard is not in operation. The telephone system has an 800-service line and 14 other lines and he had no knowledge of any difficulties with the system on February 21. The system does not have a caller identification feature and while there is no record kept of ordinary incoming calls, the record for the 800-service line, in evidence, shows that it was in operation and incoming calls were being answered between 3:45 and 4:31 p.m. on February 21. Eschleman testified that he was involved in the hiring session on Saturday, February 21, that it had been set up a couple of days in advance, and that nothing was done to try to increase the number of people interviewed or hired that day. He was not involved in the interviews but those who were hired were sent to him for indoctrination and were given a time to report to work, which was between 6:30 and 7 a.m. on Monday, February 24. He said that there is nothing unusual about a worker being hired one day and reporting to work on the next business day and that it is normal procedure. He also said that while new employees must pass a physical examination, it does not have to be done before starting to work but sometime during the employee's probationary period. Eschleman testified that the first he heard of an offer to return by the Union was on Monday when Smith asked him if he knew anything about a fax being sent on Friday, which he did not. He testified that after the strike resumed in February he had heard comments from Andrews and some union committee members that the resumed strike would be long and hard.

Ruby Hall testified that she was the switchboard operator for the Company on February 21 and that morning she answered a call from Andrews for Smith who was working in the plant. She took the message that Smith should return the call and gave it to him during one of his breaks. She did nothing to avoid answering a call from Andrews that afternoon. On Monday morning, she got a call from Smith who asked her to look in his mailbox and see if there was a fax there. She did so and found none. She then contacted someone in the sales department where the fax machine is located and the fax from Andrews was found.

Analysis and Conclusions

The law is clear that, absent a legitimate and substantial business justification, economic strikers who make an unconditional offer to return to work are entitled to immediate reinstatement to their prestrike jobs. *Solar Turbines*, 302 NLRB 14 (1991); *Laidlaw Corp.*, 171 NLRB 1366 (1968). The fact that economic strikers' jobs have been filled by permanent replacements is recognized as a legitimate and substantial reason for refusing to reinstate them. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). There is

no dispute here but that the replacement workers hired by the Respondent were permanent. It is also clear that job vacancies created by striking employees are considered filled by permanent replacement workers as of the time they accept an offer of employment. *Home Insulation Service*, 255 NLRB 311 (1981). This is true even though a striker may request reinstatement before the replacement actually begins to work. *Solar Turbines*, supra.

The fax confirmation in the record establishes that the Union had transmitted to the employer an unconditional offer to return to work on behalf of the strikers at 4:34 p.m. on February 21, the day before the acceptance of employment by 27 additional permanent replacement workers on February 22. If that transmission was an effective communication of the offer to return to work, the Respondent's failure to reinstate the 27 employees whose jobs were taken by these replacements violated Section 8(a)(3) and (1). Under the combination of circumstances involved here, I find that it was not.

The testimony of Andrews that he believed that the Respondent was deliberately refusing to answer his calls on the afternoon of February 21 and the citation in the brief of counsel for the General Counsel of the Board's decision in *Barnsider, Inc.*, 195 NLRB 754 (1972), which involved an employer's refusal to accept and read a letter communicating an offer by striking employees to return to work, suggest that the Respondent engaged in artificial devices to avoid receiving the offer on February 21. The credible evidence does not support this.

Andrews testified that during his first telephone conversation with Eschleman on February 21 he said that the Union was considering returning to work. Eschleman testified that Andrews did not make such a statement in either of their conversations that day and that the subject of a return to work was never discussed. Based on their demeanor while testifying and the content of their testimony, I credit Eschleman. Andrews appeared uncomfortable while testifying about his actions on February 21 and gave conflicting testimony about when the decision to return to work was made.[3] In his initial account of the conversation on direct, he described only telling Eschleman of his need for information about the status of the replacement workers. He did not mention telling Eschleman that the Union was considering returning to work until he was specifically asked about it by counsel for the General Counsel. I find it unlikely that Andrews would fail to remember or recount so significant a statement if it had been made. I also find it unlikely that he would confide in Eschleman information concerning the Union's internal decisionmaking processes before a decision had actually been made and before the local union membership, which had initiated the second walkout and was apparently against returning, was notified. Moreover, had Andrews discussed the possibility of a return to work with Eschleman at 12:30 p.m., it makes no sense that the subject did not come up in their subsequent conversation at 3:34 p.m. which, according to one of Andrews' statements, was after the decision to return had been made. The credible testimony of Eschleman establishes that the only things they discussed were that Andrews wanted to talk to Smith and that he wanted to know if the replacements were permanent. The credible and consistent testimony of Eschleman and Smith establishes that Smith was told only that Andrews had called him and that he wanted to know the status of the replacements.

I find there is no evidence that the Respondent had notice that an offer by the Union to return to work was imminent or even being considered or that it took any action in order to prevent such an offer from being communicated to it. The evidence concerning the telephone service at the Respondent's plant and its operation on the afternoon of February 21 establishes that there was no way it could have identified and failed to answer Andrews' calls while continuing to receive others. I also find that Smith had a reasonable explanation for his failure to call Andrews before leaving the plant that day. He credibly testified that he did not believe there was any urgency in returning the calls because he knew what information Andrews had requested, that he assumed that he wanted the information about the replacements in connection with a previously scheduled negotiating session to be held on the following Monday evening, and that he wanted to consult with counsel before answering Andrews' questions. I also credit Smith's uncontradicted testimony that he had left the plant before the fax transmission which communicated the offer to return to work had been received on February 21 and that he did not see it or know that the offer had been made until the morning of Monday, February 24.

The Respondent was entitled to formal notification of the Union's unconditional offer to return to work in order for it to be effective. *Ornamental Iron Work Co.*, 295 NLRB 473, 476 (1989). The question to be resolved is whether the fact that Smith did not receive or know about the faxed offer before the permanent replacement workers were hired on February 22 means that the Respondent had not been formally notified of the offer. Counsel for the General Counsel contends that it does not, that the Respondent bears the responsibility for its office procedures which failed to alert the appropriate management official upon receipt of a fax transmission and that the strikers should not be penalized because Smith went home early without checking his mail.[4] He also contends that there was a duty on Smith's part to contact Andrews to clarify matters before hiring more replacement workers since rumors were circulating that the strikers were returning.

The evidence fails to support the contention that Smith was aware of rumors that the strikers intended to return to work before the replacements were hired on February 22 or that any such rumors existed. Smith testified that when he left the plant on Friday there was no change in the situation at the picket line and pickets were still present. He first heard a rumor about a possible return to work on Sunday, February 23, when he was called by another member of management who told him that there had been a meeting of

[3] On direct, Andrews testified the decision was made between 12:20 and 3 p.m. On cross, he said the decision ''was not made until after the last conversation with Mr. Eschleman, which I believe took place around 3:30 p.m.'' A moment later he testified the decision was made shortly before 3:20 p.m., when he placed a call to Local President Kent Arnold to tell him about it.

[4] The evidence fails to establish that Smith went home ''early'' that day. While Andrews testified that the Respondent's office closes at 5 p.m., the evidence shows that Smith was working out in the plant that day. Smith testified that he worked throughout the day in the pipe shop from 7:30 a.m. to 3:45 p.m. Thereafter, he took a shower and picked up his mail in the mailroom before leaving the plant at about 4:30 p.m.

the union membership that day, that they did not want to return but that the International Union was ordering them to do so, and that there might be a gathering at the plant gate the next morning. He testified that when he heard this he believed there was a possibility the strike might be ending but it was also possible that there would be an attempt to block access to the plant on Monday morning. Even apart from the fact that the final group of permanent replacement workers had already been hired before Smith heard about the rumor of a possible return by the strikers, I find there was no obligation on his part to seek information from Andrews as to what transpired at the union meeting, nor was it appropriate for him to do so. Given Andrews' actions at the time of the first return to work, which included notification by means of an early morning hours telephone call to Smith's home as well as certified mail and hand delivery of a written offer to return, there was no reason for Smith to believe that Andrews was unable to reach him.

Counsel for the General Counsel argues that it was the Respondent's fault that Smith failed to learn about the fax containing the offer to return on Friday and that it would be an injustice to require that he had to know about it in order for it to be effective. On the contrary, I find that it is the actions of Andrews which cannot withstand scrutiny and that by taking the simplest of precautions he could have assured that Smith was aware of the offer before more replacement workers were hired. Andrews was admittedly aware on February 21 that the Respondent was considering hiring replacements. Despite being on notice that strikers were probably in imminent danger of being permanently replaced, he chose to transmit the offer to return to work in a manner entirely different from that which he previously employed and, after having done so, did nothing to ensure that it was effectively communicated to Smith. Andrews claims he did nothing more to contact Smith on Friday because Eschleman had promised him that Smith would return his call before he left the plant for the day. I did not believe him given Eschleman's credible denial and the credible testimony of Eschleman and Smith that they were not aware of any urgency in returning Andrews' call. If Eschleman had made such a promise, it would seem reasonable that when Smith did not call him by 5 p.m., Andrews would have made some further effort to contact him.

Under the circumstances, I find that despite the fact that the fax transmission containing the offer to return to work was physically received at the Respondent's plant on Friday, February 21, the offer was not perfected until Smith learned about it, which was not until the morning of Monday, February 24.[5] Andrews chose the means of transmitting the offer and it was his responsibility to see that it was effectively communicated to Smith. Transmission of the fax to the Respondent's sales department without prior notification after Smith had already left the plant did not constitute effective communication of the offer. It may be true that use of fax transmission is an increasingly common and acceptable means of sending messages, but it is also true that there are limits as to how and when it can be used effectively. Unlike mail service which involves regular daily deliveries that a recipient can anticipate and might be held to fail to open or process at its peril, normally, a fax transmission cannot be anticipated without notification that it is coming. Andrews admitted that he was aware of this, as he testified: ''It's only common courtesy to notify the individual you're sending a fax to prior to sending a fax.'' His excuse for failing to notify Smith that this fax was being transmitted, that the Respondent was not answering his calls, was not credible. His failure to take any followup action to ensure that Smith had received it, when contrasted with his actions in connection with the first offer to return in January, is inexplicable. Then, Andrews called Smith at home in the early morning hours of a Saturday to tell him of the offer and had a confirming letter delivered by hand and by certified mail. Here, although Smith had not returned his calls, Andrews found it unnecessary to try to reach him or leave a message at his home.

In summary, in the absence of any evidence that Smith or any other employee of the Respondent knew about the fax transmission of the offer to return to work or took action to evade obtaining knowledge of its contents, I find that the mere fact that it arrived unannounced and unseen in the sales department after Smith had left the plant for the day on Friday, February 21, did not constitute effective formal notification to the Respondent of the offer and that notification did not become effective until Smith was informed about and saw the offer on Monday, February 24. Consequently, I find that the Respondent did not violate Section 8(a)(3) and (1) of the Act by permanently replacing strikers with the replacement workers who were hired on Saturday, February 22.

CONCLUSIONS OF LAW

1. The Respondent, Clow Water Systems Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed.

[5] There is no evidence that the fax transmission received at the Respondent's plant was seen by anyone there prior to Monday morning. The sales department where the fax machine is located is on the second floor and Smith's office is on the first.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.